Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1977
No. 77-552

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF THE CASE

On June 9, 1972, Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh"), the petitioner herein, requested from the Pennsylvania Department of Environmental Resources ("DER"), by petition, a variance from the particulate matter emission regulations applicable to its Sinter Plant in Monessen, Westmoreland County, Pennsylvania. The specified regulations (25 Pa. Code §§123.13 and 123.41), became applicable to Wheeling-Pittsburgh on January 27, 1972, pursuant to the Pennsylvania Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq.

Acting on the petition, the DER, on September 25, 1972, issued an order to Wheeling-Pittsburgh, Order No. 72-565-V, which granted Wheeling-Pittsburgh a variance from the Pennsylvania Air Pollution Control Act, supra, until April 30, 1973 and *mandated* that, on and after April 30, 1973, Wheeling-Pittsburgh maintain the emissions of particulate matter from the Sinter Plant within the limits specified by DER Regulations §§123.13 and 123.41. In this order, Wheeling-Pittsburgh was notified of its right to file an appeal from the order to the Pennsylvania Environmental Hearing Board. Wheeling-Pittsburgh did not choose to appeal from the order. A petition to enforce the Order of September 25, 1972 was filed by DER in Pennsylvania Commonwealth Court on April 15, 1975, almost two years after the expiration of the variance.

Wheeling-Pittsburgh answered the petition to enforce the September 25, 1972 Order by challenging the validity of the order and the regulations on which it was predicated. The Commonwealth Court issued an opinion and pre-trial order holding that since Wheeling- Pittsburgh did not seek judicial review of the order in the statutorily designated appeal forum, it was precluded from challenging the order in the subsequent enforcing proceeding. The Commonwealth ruling has been affirmed by the Supreme Court of Pennsylvania. It is from this ruling on exhaustion of statutory remedies that Petitioner seeks review.

REASONS FOR DENYING THE WRIT

I. Petitioner is precluded from invoking the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) as Petitioner has failed to claim a deprivation of its Fourteenth Amendment rights to due process of law at any time during the proceedings in the state courts of Pennsylvania.

This is an uncomplicated case which presents no federal questions. It involves the interpretation of Pennsylvania law on exhaustion of administrative remedies. Pennsylvania Courts have consistently held that the common law and the Act of March 21, 1806, P.L. 558, 46 P.S. 156[1] require that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy. Wheeling-Pittsburgh argued to the Pennsylvania courts that the rule of exhaustion of administrative remedies should not apply unless a clear legislative intent of its application was present in the underlying statute.[2] The Pennsylvania Courts

[1] The Act of March 21, 1806, P.L. 558, 46 P.S. 156 provides that in all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of the Commonwealth, the directions of the said acts shall be strictly pursued.

[2] See p. 12 of W-P's brief before the Pennsylvania Supreme Court where the argument is summarily stated: "A

disagreed, reasoning that to allow a collateral challenge to an administrative determination would allow a litigant to bypass administrative agencies and go directly to the judiciary to resolve problems, thereby subverting the quasi-judicial nature of the Commonwealth's agency system. Wheeling-Pittsburgh never raised at any prior point in the proceedings the argument that the application of the rule of exhaustion of administrative remedies as applied in this case deprives it of its Fourteenth Amendment rights to due process of law. (See Petitioner's brief to the Pa. Supreme Court, copy of which is attached as Appendix A.)

Since Wheeling-Pittsburgh's due process claim appears for the first time in its petition to this Court for a writ of certiorari, this Court lacks jurisdiction to review this belatedly asserted claim. *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Bolln v. Nebraska,* 176 U.S. 83, 20 S.Ct. 287, 44 L.Ed. 377 (1900); *Armstrong v. Treasurer of Athens County,* 41 U.S. 281, 10 L.Ed. 965 (1842); *Howard v. Fleming,* 191 U.S. 126, 48 L.Ed. 121 (1903), 24 S.Ct. 49; *Winona Land v. Minnesota,* 159 U.S. 540, 16 S.Ct. 88, 40 L.Ed. 252 (1895); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U.S. 341, 40 S.Ct. 330, 64 L.Ed. 601 (1920).

In *Bolln v. Nebraska,* supra, an objection that the defendant was denied due process of law in being re-

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defendant can challenge the validity of an administrative order or regulation in an enforcement proceeding unless there is a clear legislative intent to the contrary."

fused a jury trial upon a plea in abatement was not raised until after the cause had been decided by the Supreme Court of Nebraska. Accordingly, this Court refused to consider those constitutional immunities not properly set up below nor appearing in the opinion presented for review by writ of error. The controlling principle was unequivocally articulated by the *Bolln* Court, supra, at 91:

> "We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specifically set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

Similarly in *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U.S. 341 (1920), a claim of invalidity under the state constitution was specifically urged and passed upon adversely to the petitioner in the state Supreme Court, but no reference was made in that connection to the Fourteenth Amendment to the Federal Constitution. Justice Brandeis aptly noted:

> "If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient claim of right under the Constitution to give this court jurisdiction [citation omitted], still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the state no

> mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here, but obviously that was too late. Chicago, Indiana and Louisville Ry. Co. v. McGuire, 196 U.S. 128, 132." *Hiawassee River*, supra, at 344.

In view of this critical flaw in the alleged jurisdiction of the U. S. Supreme Court therein, the *Hiawassee* Court refused to make any further inquiry into the substance of the claim that petitioner had been deprived of due process.

This rule continues to be universally and strictly applied by the Court. *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54 (1970); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969); *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

Consistently with the prior constructions of the requirements of 28 U.S.C. §1257 (3) mandates dismissal of the present writ for want of jurisdiction.

II. There are no special or important reasons for granting a writ of certiorari in this case as it concerns only a question of interpretation of the Pennsylvania law on exhaustion of administrative remedies.

Wheeling-Pittsburgh's petition for writ of certiorari does not comport with Rule 19 of the Rules of the United States Supreme Court as it does not set forth any special or important reasons for granting a writ. Rather, Wheeling-Pittsburgh is petitioning this Court to review a decision of the Pennsylvania Supreme Court applying the well-established rules on exhaustion of administrative remedies and finality of a determination.

A. The Pennsylvania Supreme Court Decision Is in Accord With Precedent Case Law of the Pennsylvania and Federal Courts

The Pennsylvania Commonwealth and Supreme Courts held that inasmuch as Section 4 of the Pennsylvania Air Pollution Control Act,[3] supra, and Section

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[3] Section 4 of the Air Pollution Control Act provides in relevant part as follows:

> "All department orders shall be in writing, contain therein a statement of the reasons for their issuance, and be served either personally or by certified mail. Within thirty (30) days after service of any such order the person to whom the order is issued or any other person aggrieved by such order may file with the hearing board an appeal setting forth with particularity the grounds relied upon. An appeal to the hearing board of the department's order shall not act as a supersedeas:

1921-A of the Administrative Code of 1929, as amended, December 3, 1970, P.L. 834, 71 P.S. 510-21A,[4] provide a clear, specific, and exclusive remedy for those affected by DER orders, i.e., appeal to the Environmental Hearing Board Wheeling-Pittsburgh's failure to pursue that remedy forecloses a collateral attack on the order in the subsequent enforcement proceeding.

The decision is in accord with scores of Pennsylvania decisions which restate and uniformly apply this fundamental principle.

Provided, however, That upon application and for cause shown, the hearing board of the Commonwealth Court may issue such a supersedeas. Any person aggrieved by an adjudication of the hearing board may appeal to the Commonwealth Court."

[4] Section 1921-A provides in relevant part as follows:

"(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the 'Administrative Agency Law,' on any order, permit, license or decision of the Department of Environmental Resources.

. . .

(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified."

In *Commonwealth v. Lenz*, 353 Pa. 98, 44 A.2d 291 (1945), the Pennsylvania Supreme Court held that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy.

In *Commonwealth v. Derry Township*, 466 Pa. 31, 351 A.2d 606 (1976), the Pennsylvania Supreme Court held that a party who failed to appeal a DER order is foreclosed from attack on the validity of the order in a subsequent enforcement proceeding.

In *Erie Human Relations Commission v. Erie Insurance Exchange*, 465 Pa. 240, 348 A.2d 742 (1975), the Defendant failed to appeal a Human Relations Commission order and therefore was foreclosed from contesting its merits in the enforcement proceeding.

In *Milk Maid Dairy Products, Inc. v. Milk Control Commission*, 190 Pa. Super. 410, 154 A.2d 274 (1959), the court held that the rules of trade practices could not be attacked as illegal and invalid during a hearing suspending the milk dealer's license for violating the rules of trade practices since Milk Maid Dairy Products, Inc. did not contest the rules of trade practices in accordance with the procedure afforded by statute.

In *Commonwealth v. Hitzelberger*, 419 Pa. 354, 214 A.2d 223 (1965), and in *Commonwealth v. Atlantic and Gulf Coast Stevedores, Inc.*, 422 Pa. 442, 221 A.2d 128 (1966), it was held that the taxpayer defendants were unable to question the validity of the imposition of the taxes at a proceeding for col-

lection of the taxes for reason that they failed to pursue the statutory procedure provided for attacking the imposition of the tax.

In *St. Joe Minerals Corp. v. Goddard,* 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974), the Commonwealth Court held that the statutorily provided right to appeal a DER order constituted an adequate remedy at law, precluding the collateral attack of DER regulations in equity.

In *School District of Borough of West Homestead v. Allegheny County Bd. of School Directors,* 440 Pa. 113, 269 A.2d 904 (1970), it was held that the Court of Common Pleas did not have jurisdiction to entertain an action in equity where an aggrieved school district had a right to appeal to the state board but did not do so.

In Accord: *Pittsburgh Coal Company v. School District of Forward Township,* 366 Pa. 489, 78 A.2d 253 (1951); *City of Philadelphia v. Sam Bobman Department Store,* 189 Pa. Super. 72, 149 A.2d 518 (1959); *Commonwealth v. Grier,* 215 Pa. Super. 66, 257 A.2d 317 (1969); and *Daniels v. Commonwealth,* 10 Pa. Cmwlth. 241, 309 A.2d 842 (1973).

Moreover, Pennsylvania law on the doctrine of exhaustion of administrative remedies is consistent with federal law. This fundamental principle has been applied by the federal courts in countless decisions. The following are only a few examples of the application of the doctrine by the federal courts. *United States v. Adams Wrecking Co.,* 545 F.2d 1 (6th Cir. 1976): The Court held that an order of

the Environmental Protection Agency, to which review could have been obtained under Section 307 of the Clean Air Act, is not subject to judicial review in civil or criminal proceedings for enforcement. *Whitney National Bank v. The Bank of New Orleans,* 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386 (1965): The Court held that a Federal Reserve Board determination could not be collaterally attacked in the District Court as Congress had provided an exclusive statutory procedure for review of Federal Reserve Board decisions. *Brennan v. Winters Battery Mfg. Co.,* 531 F.2d 317 (6th Cir. 1975): The Court held that an OSHA order became final and unreviewable on its merits because a notification of contest was not filed within fifteen (15) days from receipt and as a result the citation could not be contested in an enforcement action. *Sink v. Morton,* 529 F.2d 601 (4th Cir. 1975). The Court held that the enforcement of a deep mine closure order issued under the Federal Coal Mine Health & Safety Act of 1969 could not be enjoined as Plaintiff had not exhausted his administrative remedies by appeal of the order to the Secretary of the Interior. *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972): The Court held that when Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive.

B. The Doctrine of Exhaustion of Administrative Remedies As Applied in This Case Does Not Deprive Petitioner of Its Fourteenth Amendment Due Process Rights

Wheeling-Pittsburgh argues that it has been denied due process of law because it is precluded from attacking the validity of the DER order during an enforcement proceeding. However, Wheeling-Pittsburgh was given an opportunity to contest the validity of the order before it became final.[5] As Wheeling-Pittsburgh was advised of its rights to contest the order but chose not to exercise those rights, Wheeling-Pittsburgh's concern must be with the timing of judicial review, not the existence of judicial review. (See page 11, footnote 3 of Pa. Supreme Court opinion).

Due process does not require that a party shall have the right to interminably litigate the validity of an order (before, during and after its issuance); it only requires that there be an opportunity to contest the order. *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 84 L.Ed. 834 (1944); *United States v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946), *Clarkson Construction Co. v. OSHRC,* 531 F.2d 451 (10th Cir. 1976); *McLean Trucking Co. v. OSHRC,* 503 F.2d 8 (4th Cir. 1974), and *Miller v. United States,* 242 F.2d 392 (6th Cir. 1957).

[5] The adequacy of the review procedure is not an issue in this case. Section 4 of the Pennsylvania Air Pollution Control Act, supra and Section 1921-A of the Administrative Code, supra, clearly provide for an appeal to the Environmental Hearing Board from departmental orders. The procedures for perfecting such an appeal are specified in 25 Pa. Code §21.1 et seq. and are governed by the Pa. Administrative Agency Law, the Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.1 et seq. The Pa. Administrative Agency Law, supra, provides for a right of appeal from a decision of the Environmental Hearing Board to the Pa. Commonwealth Court.

This Court in *Yakus v. United States, supra,* held as constitutional the sections of the Emergency Price Control Act of 1942 which gave to the Emergency Court of Appeals exclusive jurisdiction to determine the validity of price regulations and orders of the administrator and foreclosed any further consideration of their validity as a defense to a prosecution for their violation. The Court stated that such an agreement presents no constitutional issue.

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. State of Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; Barbour v. State of Georgia, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; Whitney v. People of State of California, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis J. concurring in Whitney v. People of State of California, supra, 274 U.S. at page 380, 47 S.Ct. at page 650, 71 L.Ed. 1095, and it could hardly be maintained

that it is beyond legislative power to make the rule inflexible in all cases." *Yakus v. United States*, supra, 321 U.S. 414 at 444.

The two cases cited by Wheeling-Pittsburgh, *U.S. v. McCrillis*, 200 F.2d 884 (1st Cir. 1952), and *Smith v. U.S.*, 199 F.2d 377 (1st Cir. 1952), as support for its position, are based on the interpretation of the Housing and Rent Act of 1947. The Court in both cases held that Congress did not grant exclusive jurisdiction to one tribunal to determine the validity of the agency's actions, therefore, a party is not foreclosed from challenging the agency's action in an enforcement proceeding. There is an implicit recognition in both cases that Congress has the constitutional authority to grant exclusive jurisdiction to one tribunal.

Wheeling-Pittsburgh was not deprived of its Fourteenth Amendment rights to due process of law. The controlling fact is that Wheeling-Pittsburgh was granted a right to a hearing and a judicial determination but it chose not to exercise that right.

Since Rule 19 of the United States Supreme Court Rules states that a writ of certiorari will be granted only where there are special and important reasons therefore, and the Pennsylvania Supreme Court's decision merely reiterates the fundamental principle of exhaustion of administrative remedies, Petitioner's request for a writ of certiorari should be denied.

CONCLUSION

Respondent, DER, contends that Wheeling-Pittsburgh's petition for a writ of certiorari should be denied because (1) no federal question was raised by Wheeling-Pittsburgh during the proceeding before the Pennsylvania Supreme Court or the Pennsylvania Commonwealth Court, and (2) Wheeling-Pittsburgh raises no special or important reason for granting a writ of certiorari on a decision which merely addresses the state law on exhaustion of administrative remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas M. Burke, in accordance with Rule 33 (1) of the Rules of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on all parties required to be served by mailing three copies thereto to Paul A. Manion, Esquire, Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15230, Attorney for Petitioner, by first class mail, postage prepaid, this 4th day of November, 1977.

(s) THOMAS M. BURKE
THOMAS M. BURKE
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APPENDIX A

IN THE
SUPREME COURT OF PENNSYLVANIA
Western District

No. 64 MARCH TERM, 1976

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

v.

WHEELING-PITTSBURGH STEEL CORPORATION, Appellant.

BRIEF FOR APPELLANT

WHEELING-PITTSBURGH STEEL CORPORATION

Appeal from an Order of the Commonwealth Court at No. 529 C.D. 1975.

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STATEMENT OF JURISDICTION

This is an appeal from an order of the Commonwealth Court which: (i) denied the defendant the right to introduce evidence relevant to its affirmative defense challenging the validity and enforceability of the administrative regulations upon which this action is based; (ii) denied the defendant a jury trial; and (iii) has been duly certified for appeal. This Court has jurisdiction of this appeal under Sections 203 and 501 of the Appellate Court Jurisdiction Act of July 31, 1970, P.L. 673, No. 223, Art. II, §203 and Art. V, §501, 17 P.S. §211.203 and §211.501(b).

STATEMENT OF QUESTIONS PRESENTED

I. Whether an order of the Commonwealth Court which: (i) denied defendant the right to introduce evidence relevant to an affirmative defense which, if permitted and proved, would establish an absolute defense to this action; (ii) denied defendant the right to a jury trial; and (iii) has been duly certified for appeal by the Commonwealth Court, is an appealable order? (Not answered by the Court below).

II. Whether the Commonwealth Court erred in ruling that defendant was precluded from introducing evidence relevant to the issues of the validity and enforceability of the DER regulations upon which this proceeding is based because defendant had not appealed an earlier order of the DER which had granted it a variance from those regulations? (Negatived by the Court below).

III. Whether the Commonwealth Court erred in denying defendant a jury trial in this action? (Negatived by the Court below).

HISTORY OF THE CASE

The Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), filed this action in the Commonwealth Court in the form of a "Petition for Enforcement of Administrative Order" under Section 10(a) of the Air Pollution Control Act,

as amended ("APCA") 35 P.S. §§4001-4015. In its petition the DER requested enforcement of its administrative order which had granted defendant Wheeling-Pittsburgh Steel Corporation ("W-P Steel") a variance from the rules and regulations of the DER concerning sinter plant emissions until April 30, 1973 (R. 2a-7a).

W-P Steel filed an answer to the DER's petition in which it challenged the validity and enforceability of the DER rules and regulations upon which the order was based. In its answer, W-P Steel also demanded a jury trial (R. 11a, 13a).

Thereafter, the court (Bowman, P. J.) ordered the parties to brief the questions (i) whether W-P Steel may challenge the validity and enforceability of the DER regulations and variance order in this proceeding and (ii) whether W-P Steel is entitled to a jury trial herein (R. 18a-19a).

Following the filing of briefs, the court handed down an opinion and order ruling that W-P Steel did not have the right to introduce evidence relevant to the issues of the validity of the DER's variance order or the regulations upon which it was predicated and that W-P Steel would be denied a jury trial in this action (R. 20a-28a). *DER v. Wheeling-Pittsburgh Steel Corporation,* 348 A.2d 765 (Cmwlth. Ct. December 10, 1975).

W-P Steel appealed that order to this Court (R. 29a). Simultaneous with that appeal, W-P Steel petitioned the Commonwealth Court to certify its appeal pursuant to Section 501(b) of the Appellate

Court Jurisdiction Act of 1970, 17 P.S. §211.501(b). As indicated in that petition, W-P Steel took the position that the Commonwealth Court's order was a "final" order for purposes of appeal under Pennsylvania law inasmuch as it foreclosed W-P Steel completely from introducing evidence on a vital affirmative defense to this action. W-P Steel stated in the petition that it was requesting certification of the questions involved in the Court's ruling in order to avoid any question concerning the appealability of that ruling (R. 30a-32a).

On January 7, 1976, Judge Bowman certified his order for appeal pursuant to Section 501(b) of the Appellate Court Jurisdiction Act of 1970 (R. 34a).

Thereafter, the DER filed a motion to quash this appeal (R. 35a-36a), to which W-P Steel filed an answer (R. 37a-39a). This Court has directed that the motion to quash the appeal will be heard at the argument on the merits (R. 40a).

SUMMARY OF ARGUMENT

I. Because the order which is the subject of this appeal (i) denied the defendant the right to introduce evidence on a vital affirmative defense which, if permitted and proved, would be an absolute defense to this action, and (ii) denied the defendant the right to a jury trial, it is a final order for purposes of appeal under this Court's decision in *Posternack v. American Casualty Co. of Reading,* 421 Pa. 21, 218

A.2d 350 (1966) and its progeny. Alternatively, this Court may hear this appeal because it has been duly certified for appeal under the Interlocutory Appeals Section of the Appellate Court Jurisdiction Act of 1970, 17 P.S. §211.501 (b).

II. The Commonwealth Court erred in law in ruling that defendant could not introduce evidence relevant to the issues of the validity and enforceability of the DER regulations which are the subject of this enforcement proceeding because defendant had not appealed an earlier variance order of the DER. Since defendant was not aggrieved by that earlier order, which granted it the very relief it had requested, it had neither the right nor the duty to appeal that order. This Court has ruled that a similar challenge to the enforceability of a DER order may be raised in a proceeding, like this one, brought to enforce such an order. *DER v. Pennsylvania Power Co.*, 337 A.2d 823 (1975). Moreover, a defendant in such a proceeding can always challenge the validity and enforceability of the regulation or order which is the subject of that proceeding unless there is a clear and specific legislative intent to the contrary. 3 K. Davis, *Administrative Law Treatise*, §23.07 at 320 (1958 ed.).

III. Defendant is entitled to a jury trial in this suit to enforce an order of the DER because it is a proceeding at law brought to enforce an alleged statutory duty and is analogous to common law actions of assumpsit and trespass in which a party has a constitutional right to a jury trial. In addition, defendant is

entitled to a jury trial on its request for a declaratory judgment that the DER regulations are invalid and unenforceable 12 P.S. §839 and §852.

ARGUMENT

I. The Order of the Commonwealth Court Is an Appealable Order

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A. The order is a final order for purposes of appeal.

As previously indicated, the order in question specifically directs that "respondent shall not have the right to introduce evidence relevant to the issues of the validity of the order in question or the DER regulations upon which it was predicated; and respondent is denied a jury trial in this proceeding." The order thus precludes W-P Steel from presenting evidence at trial relevant to an affirmative defense which, if permitted and proved, would be a complete defense to this action.

For these reasons, the order is clearly a "final" order for purposes of this appeal under this Court's ruling in *Posternack v. American Casualty Co. of Reading*, 421 Pa. 21, 218 A.2d 350 (1966). In that case, the trial Court had denied the defendant leave to amend its answer to assert an affirmative defense which, if successful, would have been a complete defense to the claim asserted in the complaint. In deny-

ing a motion to quash an appeal from that order, this Court ruled:

> "The order involved effectively precluded proof at trial of what might possibly be a complete defense to the cause sued upon. As to this defense, at least, the order appealed from puts the defendant 'out of court.' It is therefore, an appealable order" 218 A.2d at 351.

Accord:

Grota v. LaBoccetta, 425 Pa. 620, 230 A.2d 206 (1967) [Order denying leave to assert the affirmative defense of a release held a final order for purposes of appeal];

McCahill v. Roberts, 421 Pa. 233, 219 A.2d 306 (1966) [Order releasing real estate from plaintiff's claim but directing that proceeds should be held in escrow pending a further adjudication held a final order for purposes of appeal];

Goldman v. McShain, 432 Pa. 61, 247 A.2d 455 (1968) [Order holding that no enforceable contract had been pleaded and certifying case to law side of Court held a final order for purposes of appeal].

B. The order has been duly certified for appeal.

Even if the order were treated as an interlocutory order, it has been duly certified for appeal by the Commonwealth Court in accordance with Section 501-(b) of the Appellate Court Jurisdiction Act of 1970,

17 P.S. §211.501, as involving controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation. Accordingly, this Court may hear this appeal under Section 501 (b) in the event it should determine that the order is not a final order for purposes of appeal.

II. The Commonwealth Court Erred in Ruling That W-P Steel Is Precluded From Challenging the Validity of the DER'S Regulations in This Proceeding

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A. The Commonwealth Court's order is premised upon a fundamental misconception of the order which granted the variance.

The crux of Judge Bowman's ruling that W-P Steel is precluded from challenging the validity and enforceability of the DER's regulations concerning sinter plant emissions in this proceeding is that W-P Steel should have raised this issue in an appeal from the DER's grant of the variance which the Company had requested. W-P Steel respectfully submits that this ruling is based upon a fundamental misconception of the nature of the order which granted the variance. Since that order gave W-P Steel the identical variance which the Company itself had requested, W-P Steel was not "aggrieved" by the order, as required by 35 P.S. 4004 (4.1) in order to justify such an appeal.

Nor, contrary to the conclusion of Judge Bowman, was the Company "aggrieved" because the variance purported to require it to comply with the DER's regulations by April 30, 1973. For this provision of the variance imposed no greater obligation on W-P Steel following the expiration of the variance than had been imposed upon it by the regulations themselves before the variance was granted. Thus, although the DER denominated the grant of the variance as an "order," in legal effect the variance was the very opposite of a coercive abatement order issued under 35 P.S. §4004 (4.1). It is this intrinsic feature of the DER's variance order which makes inapposite the cases upon which Judge Bowman relied.

The Court first cited language from its opinion in *DER v. Pennsylvania Power Company,* 12 Pa. Cmwlth. Ct. 212, 316 A.2d 96 (1974), *aff'd,* 337 A.2d 823 (1975) which had criticized the respondent in that case for not appealing from abatement orders issued by the DER. But in that case the respondent chose not to appeal a coercive abatement order which had directed it to install certain pollution control devices and to submit timetables for compliance with the underlying regulations. As we have previously shown, the variance order in the instant case temporarily relieved W-P Steel of the burden of the DER's regulations and W-P Steel had no basis to appeal the order which granted the relief which it requested.

Actually, the decision of this Court in *Pennsylvania Power* supports W-P Steel's position in this case. For

there this Court permitted the respondent to raise a defense initially in an enforcement action notwithstanding that it had failed to appeal a mandatory injunction order of a Court of law—not merely, as here, an administrative order granting a temporary variance. 337 A.2d 823.

Penn Power involved an order of the Court of Common Pleas of Lawrence County which required the power company to submit a pollution control plan in compliance with newly promulgated particulate matter and sulfur dioxide emission standards. Penn Power did not appeal the order but submitted a timely application to DER setting forth a commitment to install what then appeared to be the "best available technology." The DER neither rejected nor accepted the application, but instead filed a petition for contempt with the Court of Common Pleas.

The Court of Common Pleas denied the contempt petition on the ground, *inter alia,* that it was impossible for Penn Power to comply with the Court's order. Rejecting DER's contention that the impossibility defense could not be raised for the first time in a hearing for contempt, the Commonwealth Court and this Court each unanimously affirmed.

This Court explained that the impossibility defense was not available to Penn Power during any prior hearing on the order. This Court also pointed out that Penn Power felt that its application for plan approval was valid, that it had been accepted by DER and had been incorporated into the order, and that, therefore, "even if legally able to petition or appeal

[the order], such actions could reasonably have appeared premature to" Penn Power. 337 A.2d at 831-32.

Similarly, W-P Steel believed it could comply with the DER's variance order of September 25, 1972. An attack upon the validity and enforceability of the regulations by W-P Steel at that time appeared premature to W-P Steel.

The other cases relied on in the opinion of the Commonwealth Court are distinguishable from this case. Four of those cases involved belated attempts to challenge the validity of action taken by an administrative agency at an earlier stage of the proceedings in the face of a failure by the respondent to follow specific statutory provisions which provided an unequivocal right of appeal from that determination.[1]

St. Joe Minerals Corp. v. Goddard, 14 Pa. Cmwlth. Ct. 624, 324 A.2d 800 (1974), held only that there was no jurisdiction in equity to consider a challenge to the validity of DER regulations because this challenge could be considered on appeal from the *denial* of the requested variance.

Standard Lime & Refractories Co. v. DER, 2 Pa. Cmwlth. Ct. 434, 279 A.2d 383 (1971) involved the

[1] *City of Philadelphia v. Sam Bobman Department Store Co.,* 189 Pa. Super. 72, 149 A.2d 518 (1959); *Commonwealth v. Lentz,* 353 Pa. 98, 44 A.2d 291 (1945); *Milk Maid Dairy Products, Inc. v. Milk Control Commission,* 190 Pa. Super. 410, 154 A.2d 274 (1959); *Erie Human Relations Commission v. Erie Insurance Exchange,* 12 Pa. Cmwlth. Ct. 267, 315 A.2d 663 (1974), *aff'd,* 348 A.2d 742 (1975).

question whether a letter from the predecessor to the DER to the appellant, which denied it a hearing on a proposed timetable of compliance with respect to a previously issued abatement order, could form the basis for an appeal to the Commonwealth Court. The Court held that it could not. In *dicta* the Court commented that the appellant could not thereafter question the original *abatement order.*

W-P Steel submits that none of these cases rules this case since W-P Steel had no prior opportunity to challenge the DER regulations involved in this proceeding.

B. A defendant can challenge the validity of an administrative order or regulation in an enforcement proceeding unless there is a clear legislative intent to the contrary.

Even if W-P Steel could have challenged the DER regulations on appeal from the grant of the variance which it requested, it would not be foreclosed from making such a challenge in this enforcement action. The weight of authority is that a defendant in a proceeding to enforce an administrative order or regulation can challenge its validity in that proceeding unless the statute in question manifests a clear legislative intent to the contrary. As the recognized expert on administrative law, Professor Kenneth Culp Davis, states in his treatise on this subject:

> "In general, a defendant in a civil or criminal proceeding brought to enforce an administrative order or regulation may defend*ant* on the ground of invalidity of the order or regulation, in absence

> of affirmative legislative intent to the contrary. The natural assumption is that one may not be held civilly or criminally liable for violating an invalid order or regulation. The tradition is deeply embedded that even statutes may be challenged by resisting enforcement."[2]

See also, L. Jaffe, *Judicial Control of Administrative Action,* at 426 (1965 ed.).

The statutes applicable to the within action clearly do not prohibit W-P Steel from asserting a defense based upon the invalidity of the DER order and regulations. Section 4(4.1) of the APCA, 35 P.S. §4004 (4.1), states that a person to whom an order is issued by the DER or any other aggrieved by such order *may* file an appeal with the Environmental Hearing Board ("EHB"). That section further provides that any person aggrieved by an adjudication of the EHB *may* appeal to the Commonwealth Court. The language of the statute is clearly discretionary. There is no language which sets up a mandatory administrative or judicial review procedure which, if bypassed, would eliminate any further consideration of the validity of the order or regulations by the judiciary. Moreover, there is no intent to exclude the issue of validity in the enforcement stage of proceedings.[3]

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[2] 3 K. Davis, *Administrative Law Treatise,* §23.07 at 320 (1958 ed.).

[3] Compare this section of the APCA with §307(b)(1) of the federal Clean Air Act, 42 U.S.C. §1857h 5(b)(1), wherein Congress provided for review of certain actions of the Administrator of the Environmental Protection Agency *only* in the United States Court of Appeals for the District of Columbia *and* for review of certain other actions *only* in the United States Court of Appeals for the appropriate circuit. Moreover, in §(b)(2), Congress specifically stated that action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. There is no such provision in any Pennsylvania statute relevant to the instant action.

Further, a statute should not be read to include such a provision. Professor Jaffe explains:

> ". . . When a statute is read to exclude judicial consideration of validity, by any other than the statutory court, it is likely to have the consequence that the administrative procedure is an absolute requisite of review since it is only orders resulting from such procedure which are stated to be subject to the jurisdiction of any Court. *But a statute should not if possible be read so* (emphasis in original). *A Court should not lightly entertain the presumption that a statute means to embody a rule of exhaustion which excludes the application of traditional equitable considerations"* (emphasis added). L. Jaffe, Judicial Control of Administrative Action 426 (1965 ed.).

Similarly, Section 41 of the Administrative Agency Law ("AAL"), 71 P.S. §1710.41, provides that any person aggrieved by an adjudication of an administrative agency shall have the *right* to appeal therefrom. There is nothing in that section which renders an agency's determination final and binding in the absence of an appeal, or which precludes a challenge to the validity of an administrative order or regulation in an enforcement proceeding.

Although there is a dearth of authority on this question in Pennsylvania,[4] the precedent in other jurisdictions supports W-P Steel's contention in this case.

For example, in *United States v. McCrillis,* 200 F.2d 884 (1st Cir. 1952), the government brought an action to recover statutory damages for rental overcharges and to obtain an injunction and an order of restitution under the Housing and Rent Act of 1947, as amended. The government contended that a landlord defending an enforcement suit had no standing to challenge in the district court the validity of the regulation or order claimed by the government to have established the lawful maximum rent, where the landlord had failed to invoke the available administrative procedure whereby he might have had the regulation or order set aside by administrative action. The Court of Appeals held that the landlord could raise the issues of invalidity, explaining:

> "In the absence of any statutory provision on the subject, we stated in *Smith v. United States, supra* [199 F.2d 382] that we were not aware 'of any general judge-made doctrine that a defendant in an enforcement suit, charged with having violated an administrative regulation or order, is precluded from setting up the defense that the regulation or order is invalid, merely because the defendant had failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the regulation or order' " 200 F.2d at 886.

[4] But see this Court's opinion in *Pennsylvania Power Co., supra.*

The *Smith* case cited in *McCrillis* was an action brought by a tenant against his landlord under the Housing and Rent Act of 1947 for restitution of alleged rent overcharges and for a permanent injunction against further violations of the Act and the regulations thereunder. The First Circuit Court of Appeals pointed out that neither the Housing and Rent Act nor the regulations issued pursuant thereto precluded a defendant charged in an enforcement suit from setting up the defense of invalidity of the regulation merely because he had failed to make use of available administrative procedures to set it aside. In view of the absence of such statutory provisions or similar judge-made doctrine, the court held that the district Court had jurisdiction to adjudicate the defense of invalidity. *Smith v. United States,* 199 F.2d 377 (1st Cir. 1952).

Similarly, in *County of Lake v. MacNeal,* 24 Ill. 2d 253, 181 N.E. 2d 85 (1962), the Supreme Court of Illinois held that a defendant in an action instituted by the county government could raise any defense which exonerates him from liability. That case involved an action by a local government to enjoin property owners from violating a county zoning ordinance. The defendants pleaded that the Zoning was unconstitutional and void. The government contended that the validity of the ordinance could not be challenged in the injunction action because the defendants had not exhausted their administrative remedies to secure relief from the enforcement of the ordinance.

The Illinois Supreme Court followed "the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an in-

valid ordinance" and held that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendant from liability, including the defense of the invalidity of the ordinance: The court further explained (181 N.E. 2d at 90):

> "... So long as local authorities institute an action, a defendant should be entitled to defend on the ground of the invalidity of the ordinance and to have the issue determined. If it were to be otherwise, the result could be that judicial machinery would be used to enforce an ordinance that is unconstitutional."

It follows from these authorities and from this Court's decision in *Penn Power* that a party may question the validity of an order or regulation in a compliance proceeding.

As discussed above, *Penn Power* held that the defense of impossibility of performance can be raised in an enforcement proceeding initiated by DER even though the issue had not previously been raised. The defense of impossibility is inextricably linked to the validity of the order and the regulations upon which the order is based since an order or regulation which compels the impossible is, *a fortiori,* unreasonable and invalid.

More importantly, *Penn Power* held that a party may not be held in contempt for failure to comply with an order which compels the impossible. In other words, an order which compels the impossible is unenforceable under *Penn Power*. It necessarily follows

that an order which is unenforceable is invalid and void.

Additionally, public policy considerations militate in favor of W-P Steel being permitted to challenge the validity of the DER's regulations in the instant proceeding. Allowing the challenge at this time encourages parties to seek compliance with agency orders at the time of issuance rather than to appeal automatically all such orders in order to preserve issues for later proceedings. On the other hand, if W-P Steel is denied the opportunity to raise the issue of invalidity at this time, this Court will be encouraging piecemeal appeals of all agency orders while at the same time discouraging parties from good faith attempts to comply with agency orders.

Finally, any reliance by the DER upon the Act of March 21, 1806, P.L. 558, 46 P.S. §156, which requires strict pursuit of statutory remedies, is misplaced. As this Court has held, a necessary prerequisite to the applicability of that Act is that the statutory remedy must be *exclusive. School District of the Borough of West Homestead v. Allegheny County Board of School Directors,* 440 Pa. 113, at 118-119, 269 A.2d 904 (1970). As we have earlier pointed out, neither the APCA nor the AAL provides an exclusive statutory remedy for challenging the validity of the DER regulations. Moreover, here W-P Steel had no basis for appealing the order which granted it the identical variance which it had requested.

III. W-P Steel Has a Constitutional Right to a Jury Trial in This Action

A. W-P Steel is entitled to a jury trial on the DER's petition for enforcement of its order.

In its answer to the DER's petition for enforcement of its order, W-P Steel has demanded a jury trial of the issues raised in this action. The basis for that demand may be found in Article I, Section 6 of the Constitution of Pennsylvania, which provides as follows:

> "Trial by jury shall be as heretofore, and the right thereof remains inviolate."

There is, of course, a strong tradition in Pennsylvania in favor of the right to trial by jury, *William Goldman Theatres, Inc. v. Dana,* 405 Pa. 83, 93, 173 A.2d 59, 64, *cert. denied,* 368 U.S. 897 (1961); *Commonwealth v. Fugmann,* 330 Pa. 4, 29, 198 Atl. 99, 111 (1938); *Commonwealth v. Dillworth,* 431 Pa. 479, 486, 246 A.2d 859, 862 (1968).

In order to determine whether the constitutional right to a jury trial is applicable to the instant proceeding, one must first analyze the nature of this suit to determine whether it is in the nature of an action at law or a suit in equity. The starting point is the statute which authorizes the DER to petition the court for enforcement of its order, Section 10(a) of the APCA, 35 P.S. §4010(a). Although that Section is silent on the right to a jury trial, it is clear that proceedings under it are at law rather than in equity. For under traditional principles of Pennsylvania law, a statutory remedy gives rise to an action at law rather than in equity: *Pennsylvania Life Insurance Co. v. Pennsylvania National Life Ins. Co.,* 417 Pa. 168, 208 A.2d 780 (1965); *Commonwealth v. Glen Alden Corp.,* 418 Pa. 57, 210 A.2d 256 (1965); *Gordon v. Biesinger,* 335 Pa. 1, 6 A.2d 425 (1939).

Section 10(a) provides a specific statutory remedy at law: a petition to enforce an administrative order. It stands in marked contrast to the other subsections in Section 10: Section 10(b) authorizes the institution of an action in equity for an injunction to restrain violations of the Act or the rules and regulations promulgated thereunder; Section 10(c) provides for an action in mandamus; Section 10(d), like Section 10(b), authorizes equitable actions for injunctions; and Section 10(f) authorizes suits to abate nuisances or to restrain violations at law or in equity.

Next, it must be determined whether this is the type of action at law in which there was a right to a jury trial at common law. Because a petition to enforce an administrative order was unknown at common law, the question is whether this statutory remedy is analogous to any common law remedy in which there was a right to a jury trial. *Byers and Davis v. Commonwealth,* 42 Pa. 89 (1862); *Rhines v. Clark,* 51 Pa. 96 (1863). In making this analysis, the paramount Pennsylvania policy in favor of trial by jury must be borne in mind.[5]

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[5] The Commonwealth Court ruled that because this proceeding is "wholly a creature of recent statutory law," 348 A.2d at 768, there is no right to a jury trial. That conclu-

Insofar as the DER seeks to enforce an outstanding administrative order in this action, this suit involves an action in assumpsit on a judgment or order:

> "At common law the proper form of action on a judgment, irrespective of the nature of the original cause of action, was debt, and not assumpsit. In Pennsylvania, since all demands formerly recoverable in debt must be enforced and recovered in an action of assumpsit, the form of action on a judgment is assumpsit, ...
>
> "The Rules of Civil Procedure recognize that an action of assumpsit may be maintained on a judgment, order, or decision of a domestic or foreign Court, judicial or administrative tribunal or board, commission, or officer, in Rule 1019(e), setting forth the necessary contents of pleadings." 1 *Standard Pennsylvania Practice* Ch. 3 §22 at 462-63 (Footnotes omitted).

Of course, it is well established that there is a right to a jury trial in an action of assumpsit. 50 C.J.S., Juries, §16 at 731; 47 Am. Jur. 2d, Jury, §39 at 657-58. *See also,* 5 J. Moore, *Federal Practice,* ¶38.11[5] at 118-120.

Insofar as the DER seeks in this action to enforce a right of action arising out of an alleged failure of W-P Steel to perform a statutory duty, this suit is in the nature of an action in trespass:

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sion does not follow from the premise. Where, as here, the statute is silent on the right to a jury trial, it must be determined whether the statutory remedy is analogous to a common law remedy in which there was a right to a jury trial.

> "Trespass is generally the proper form of action to enforce a right of action arising out of a failure to perform a statutory duty. It is the proper remedy to enforce a right of action against a constable for his refusal to assist in making an appraisement and sale of chattels distrained for rent, and to enforce a claim for double the value of goods taken on a wrongful distress." 1 *Standard Pennsylvania Practice* Ch. 3 §44 at 486 (footnotes omitted).

And it is clear beyond peradventure that an action in trespass in Pennsylvania gives raise to a right to trial by jury. As Professor Amram has observed, "The actions of trespass, trover and trespass on the case, which are now consolidated into the action of trespass, have always been subject to jury trial." 1 Goodrich-Amram, *Standard Pennsylvania Practice,* §1048-1, at 304.

Thus, defendant is entitled as a matter of legal right to a jury trial on the DER's petition to enforce its administrative order in the Commonwealth Court.[6]

B. W-P Steel is entitled to a jury trial on its request for declaratory relief in its answer.

In the prayer for relief in its answer to the DER's petition, W-P Steel has requested the Court to enter a declaratory judgment that the order and regulations in

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[6] It should be noted that the Pennsylvania Rules of Civil Procedure specifically contemplate the trial of jury actions in the Commonwealth Court. Pa. R.C.P. 215.1.

question are invalid and unenforceable (R. 12a). Consistent with its First Defense of impossibility of performance, W-P Steel also requested the Court to enter a declaratory judgment that the order is unenforceable on that ground as well.

Under the Pennsylvania Declaratory Judgment Act, Act of June 18, 1923, P.L. 840, as amended, 12 P.S. §§831-853, W-P Steel has a legal right to a jury trial on the issues of fact raised by its request for declaratory relief. The provisions of the Act granting W-P Steel that right are Section 9 of the original Act, 12 P.S. §839, and Section 6 of the Supplemental Act of May 22, 1935, P.L. 228, 12 P.S. §852. These sections provide as follows:

> "§839. *Jury Trial*
>
> "When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."
>
> * * *
>
> "852. *Jury Trial*
>
> "If the petitioner or a defendant desires any issue of fact to be tried and determined by a jury, he shall so demand in his petition or answer, and if no such demand is made, its absence shall be treated as equivalent to an agreement to dispense with trial by jury, and that all issues of fact, as well as those of law, may be determined and found by the court, subject to exceptions and appeal, as in equity cases."

These sections make it clear that the parties to a declaratory judgment action in Pennsylvania have a statutory right to a jury trial in that action unless they fail to make a timely demand therefor. And the reported cases under Section 6 of the Supplemental Act which have denied that right have done so solely on the basis of the failure to make a timely demand therefor or because of an agreement to dispense with trial by jury: *Guerra v. Galatic,* 185 Pa. Super. 385, 137 A.2d 866 (1958); *Melnick v. Melnick,* 154 Pa. Super. 481, 36 A.2d 235 (1944); *Stone v. Fenstermacher,* 74 D&C 440 (1950); *McCandless v. Burns,* 377 Pa. 18, 104 A.2d 123 (1954).

Of course, issues of fact requiring resolution by a jury lie at the heart of defendant's request for declaratory relief in this action. Indeed, it would be difficult to imagine a case in which factual issues could be more predominant. For example, defendants request a declaratory judgment that the DER's rules and regulations are invalid and unenforceable because (a) they are unnecessarily stringent for the protection of the public health, safety or welfare; (b) they attempt to impose standards which are unreasonable and impossible of attainment with available technology; (c) they are arbitrary and capricious in the light of available technology; and (d) they are incapable of rational enforcement and are void for vagueness. It is readily apparent that these claims are replete with issues of fact, as is defendants' claim that the DER order is unenforceable because it is impossible to comply with it.

Nor can defendant's right to a jury trial on its request for declaratory relief be denied merely because it was asserted in answer to the DER's petition for enforcement. Section 7 of the Supplementary Act specifically provides that the procedural context in which the request is made does not affect the right to relief:

> "§853. *Power of the court to enter judgment decree.*
>
> "Nothing in this act shall prevent a court from entering a declaratory judgment or decree in any civil proceeding, suit, or action no matter how commenced, where all parties, to be affected, are actually in court or have had such notice of the proceeding, suit, or action as it required by law, and where the court is convinced, that such a judgment or decree is appropriate and proper to be entered."

Finally, the Court's limited discretion to deny the requested relief under Section 6 of the original Act, 12 P.S. §836, which has been severely curtailed by recent decisions of this Court,[7] clearly does not and cannot affect defendants' statutory right to a jury trial of the factual issues involved in defendant's request. The Commonwealth Court's ruling to the contrary is clearly erroneous. That ruling was based on the language in Section 6 providing that "where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed." But as

[7] *Friestad v. Travelers Indemnity Co.*, 452 Pa. 417, 306 A.2d 295 (1973); *Liberty Mutual Ins. Co. v. S.G.S. Co.*, 456 Pa. 94, 318 A.2d 906 (1974).

we have already demonstrated, pp. 12-14, neither the APCA nor the AAI provides a special form of remedy to respondent in this case.

More importantly, the Court neglected to quote the following qualifying clause in Section 6, which provides:

> ". . . but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinary legal remedy, *whether such remedy is recognized or regulated by statute or not,* shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present . . ." (emphasis supplied). 12 P.S. §836.

In this case a mere appeal through the administrative process would not have resulted in the kind of relief which W-P Steel requests the court to grant it in this action, *i.e.*, not merely an order dismissing the DER's petition to enforce but a declaratory judgment that the order and the regulations upon which it is based are invalid and unenforceable. Without such declaratory relief, the DER would be free to institute another proceeding to enforce its rules and regulations at some later date. Thus, it is essential to W-P Steel that it receive the declaratory relief which it has requested in this action.

As support for its decision, the court cited *Gold v. Department of Public Instruction,* 16 Pa. Cmwlth. Ct. 237, 328 A.2d 559 (1974). But the clearly stated

basis for the decision in *Gold* was that there was an alternative, exclusive statutory remedy available to the party who had sought a declaratory judgment in that case. As we have already demonstrated, there is no such exclusive statutory remedy in this case and, in any event, no such statutory remedy could provide W-P Steel with what it requests in this action, *i.e.*, a declaratory judgment that the DER's order and regulations are invalid and unenforceable. Only if it is granted such declaratory relief will W-P Steel be safeguarded against further prosecution by the DER.

Conclusion

For the foregoing reasons, defendant respectfully submits that the order of the Commonwealth Court should be reversed with directions: (i) to permit defendant to engage in discovery and to introduce evidence at trial relevant to the validity and enforceability of the DER regulations and (ii) to grant defendant a jury trial in this action.

Respectfully submitted,

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